No. 78-425

In the Supreme Court of the United States

OCTOBER TERM, 1978

P.C. PFEIFFER COMPANY, INC. AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION, PETITIONERS

v.

DIVERSON FORD AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

AYERS STEAMSHIP COMPANY AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION, PETITIONERS

v.

WILL BRYANT AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

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1. Respondent Ford, an employee of petitioner P.C. Pfeiffer Co., was injured at the Port of Beaumont, Texas, while securing a military vehicle into place on a railway flat car for shipment inland. The vehicle had arrived at

the port several days earlier; it had been unloaded from a seagoing vessel, stored for a period of time, and then loaded onto the flat car. Ford's work was thus the last step in transferring the cargo from sea to land transportation. Although Ford was not a longshoreman by trade, he was working at Pfeiffer's marine terminal at the time of his injury (Pet. App. 46). The administrative law judge held that Ford was not within the coverage of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, but the Benefits Review Board reversed and held that Ford is entitled to benefits under the Act.[1]

The court of appeals affirmed the decision of the Benefits Review Board, holding that the work Ford was performing at the time of his injury "was evidently an integral part of the process of moving maritime cargo from a ship to land transportation" (Pet. App. 47). Since Ford unquestionably would have been covered by the Act if his work had been "part of a continuous operation which began with the cargo's departure from a ship's hold," coverage should not be denied, the court concluded, merely because the cargo had come to rest for the period of time that it was stored in the marine terminal (*ibid.*).

Respondent Bryant, an employee of petitioner Ayers Steamship Company, was injured while he was engaged in

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[1]Ford was held to be within the Act's coverage because his injury occurred in a shoreside area "customarily used by an employer in loading, unloading, repairing, or building a vessel," as required by Section 3(a) of the Act, 33 U.S.C. 903(a), and because he was deemed to be an "employee" under Section 2(3) of the Act, 33 U.S.C. 902(3). The definition of "employee," added in relevant part when the Act was amended in 1972, includes "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations."

his regular job of unloading cotton from wagons near a pier in Galveston, Texas. The cotton ordinarily is stacked in pier-side warehouses by "cotton headers" such as Bryant. The cotton remains there until employees denominated as "longshoremen" take it on board seagoing vessels for further shipment elsewhere (Pet. App. 48). As in Ford's case, the administrative law judge found that Bryant was outside the coverage of the Act, but the Benefits Review Board reversed, holding that because Bryant was engaged in longshoring operations and was injured at a maritime situs, he is entitled to benefits under the Act.

The court of appeals affirmed, holding that the Board had a reasonable legal basis for its conclusion that Bryant was performing longshoring operations (Pet. App. 49). Even though Bryant was not technically a longshoreman, the court observed, there would have been "no doubt that Bryant would be directly involved in 'longshoring operations' if, instead of setting the cargo down, he had handed it to a 'longshoreman' for immediate loading on board a ship" (*id.* at 49-50). The result should not be different, the court held, simply because the cotton remained at rest in the warehouse for some period of time before being loaded onto seagoing vessels: "The brief discontinuity in time created by the cotton's temporary storage did not alter the essential nature of Bryant's work, which was an integral part of the ongoing process of moving cargo between land transportation and a ship" (*id.* at 50).

2. This case presents an important issue left unresolved in this Court's decision in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 272-273 (1977): whether maritime employment, for the purposes of the Act, includes all physical cargo handling in the waterfront

area, and particularly tasks necessary to transfer cargo between land and water transportation. Although Caputo, one of the two claimants in *Northeast Marine*, was performing duties indistinguishable in any material respect from the duties performed by Ford and Bryant, Caputo was a regular member of a stevedoring gang and—unlike Ford and Bryant—was unquestionably a "longshoreman" by occupation. The Court held that Caputo was an "employee" within the meaning of the Act because he was a longshoreman; it therefore did not find it necessary to address the question whether his duties in transferring maritime cargo to and from land transportation constituted "longshoring operations" within the meaning of the Act and whether he was within the coverage of the Act on that ground as well.

This unresolved question has provoked a conflict among the courts of appeals. Although the Fifth Circuit in the instant case upheld the Board's ruling that shoreside loading and unloading operations to and from land transportation are "longshoring operations," the Ninth Circuit has reversed the Board on the same issue, in *Cargill, Inc.* v. *Powell*, 573 F. 2d 561 (9th Cir. 1977), petition for cert. pending, No. 77-1543. The question whether and under what circumstances loading and unloading to and from land transportation in a marine terminal constitute "longshoring operations" has caused confusion in other courts of appeals as well. See, *e.g.*, *I.T.O. Corp.* v. *Benefits Review Board*, 542 F. 2d 903 (4th Cir. 1976) (*en banc*), vacated and remanded in part *sub nom. Adkins* v. *I.T.O. Corp.*, 433 U.S. 904, on remand, 563 F. 2d 646 (4th Cir. 1977) (loading onto land transportation held covered); *Sea-Land Service, Inc.* v. *Director, Office of Workers' Compensation Programs*, 552 F. 2d 985 (3d Cir. 1977) (remanded for determination whether loading of land transportation was an integral

part of maritime operations); *Conti* v. *Norfolk and Western Ry.*, 566 F. 2d 890 (4th Cir. 1977) (unloading from land transportation not covered).

Because of the importance of the issue and because the conflict on the issue has divided two major deep-water circuits, we do not oppose the petition for a writ of certiorari in this case. As we stated in our memorandum in *Powell*, the instant case presents the issue in a more suitable context for resolution than does *Powell*. Petitioner in *Powell* was a longshoreman by trade, and he could be held to fall within the coverage of the Act on that basis alone, without the need to reach the question whether his activities in unloading grain from land transportation constituted "longshoring operations" within the meaning of Section 2(3) of the Act. Because neither Ford nor Bryant was a longshoreman, the instant case squarely presents the single issue on which the courts of appeals are in conflict. Accordingly, we recommend that the Court grant review in this case and hold the petition in *Powell* pending the disposition of this case.

Respectfully submitted.

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